Tan Kim Hor v Tan Chong & Motor Co Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–1179 OF 2002
ZAINUN ALI J
23 OCTOBER 2002

Civil Procedure *— Disqualification of judge — Application to disqualify judge from hearing case — Whether judge commented adversely on credibility of plaintiff — Whether this disqualified judge from further trying case — Whether there was real danger of bias*

The plaintiff had applied, inter alia, for a declaration that the failure of the fourth, fifth and sixth defendants to reappoint him as director was wrong in law, unjustified and therefore null and void; and an injunction to restrain the first, second, third, fourth and fifth defendant from passing any resolution or make any decision to oust the plaintiff as director. The present application was brought by the plaintiff that the trial judge be at liberty to discharge herself from hearing and determining the action.

Held, dismissing the application:

(1) It has always been recognized that judges ground their judicial opinion on logical reasoning based on the material before them, sustained by objective evidence. In so doing, many judges conserve expressions of belief or disbelief to cases where it is essential to express them. More specifically, cases may arise where judges feel obliged to express an opinion as to the character of the party. If this fact is the basis of the judge's decision, candor and honesty in the expression of judicial reason requires the conclusion to be stated. And if this is made in the context of deciding questions of fact by a disclosed reasoning process, if they are necessary to show why such questions have been resolved in a certain way, a failure by the judge to state them not only breaches his obligation to give reasons, but leads potentially to injustice for the party who would otherwise benefit from them. To question this, would be in some way, to impugn the judge's neutrality (see pp 285G–286B).

(2) At its most basic, the event's findings which were not favorable to the plaintiff could not amount to bias. The mere fact that the plaintiff alleged bias was not of itself ground for disqualification of a judge. Based on the real danger of bias test, each case must be judged on its own facts and one must be cautious not to take the words out of context and magnify them to excessive scrutiny. The plaintiff's contention that the basis of his claim was that he had been ousted as director of the defendant companies on

account of the court's findings was unsustainable, and verged on sheer exaggeration (see pp 286H–287A); *R v Gough* [1993] 2 All ER 724 followed.

[Bahasa Malaysia summary

Plaintif telah memohon, antara lain, untuk satu pengisytiharan bahawa kegagalan defendan-defendan keempat, kelima dan keenam untuk melantik semula beliau sebagai pengarah adalah salah di sisi undang-undang, tidak wajar dan oleh itu batal dan tak sah; dan satu injunksi untuk menghalang defendan-defendan pertama, kedua, ketiga, keempat dan kelima daripada meluluskan sebarang resolusi atau membuat sebarang keputusan untuk menyingkir plaintif sebagai pengarah. Permohonan semasa telah dibawa oleh plaintif bahawa hakim perbicaraan hendaklah bebas untuk melepaskan dirinya daripada mendengar dan menentukan tindakan tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Ianya telah sentiasa diiktirafkan bahawa hakim-hakim mengasaskan pendapat kehakiman mereka atas alasan-alasan logik berdasarkan bahan-bahan yang terdapat di hadapan mereka, dibenarkan oleh keterangan objektif. Dalam melakukan sedemikian, kebanyakan hakim-hakim memelihara ungkapan-ungkapan kepercayaan atau ketidak-percayaan kepada kes-kes di mana ianya penting untuk menyatakannya. Lebih khusus lagi, kes-kes mungkin berbangkit di mana hakim-hakim merasakan wajib untuk menyatakan sebuah pendapat berhubung dengan sifat pihak tersebut. Jika fakta ini adalah asas bagi keputusan hakim, ketulusan dan kejujuran dalam menyatakan alasan kehakiman memerlukan supaya kesimpulan dinyatakan. Dan jika ini dilakukan dalam konteks memutuskan persoalan-persoalan fakta melalui satu proses alasan yang didedahkan, jika ianya perlu untuk menunjukkan mengapa persoalan-persoalan sedemikian diselesaikan dalam cara yang tertentu, kegagalan oleh hakim untuk menyatakannya bukan sahaja mengingkari kewajipan-kewajipan beliau untuk memberikan alasan, tetapi berpotensi membawa kepada ketidak-adilan bagi pihak tersebut yang sebaliknya mungkin akan mendapat manfaat daripadanya. Bagi mempersoalkan perkara ini adalah mencabar keberkecualian hakim (lihat ms 285G–286B).

(2) Paling tidakpun, keputusan peristiwa itu yang mana tidak memihak kepada plaintif tidak membawa kepada berat sebelah. Fakta semata-mata bahawa plaintif mendakwa berat sebelah adalah bukan dengan sendirinya alasan untuk tidak melayakkan seseorang hakim. Berdasarkan ujian kemungkinan berat sebelah yang pasti, setiap satu kes mestilah dihakimi atas fakta-faktanya

yang tersendiri dan seseorang mestilah berhati-hati untuk tidak membawa perkara-perkara tersebut di luar konteksnya dan memperbesar-besarkannya sehingga penelitian yang keterlaluan. Penegasan plaintif bahawa asas tuntutan beliau ialah bahawa beliau telah disingkir sebagai pengarah syarikat-syarikat defendan berdasarkan keputusan mahkamah adalah tidak boleh dibenarkan, dan cenderong untuk memperbesarkan-besarkannya sahaja (lihat ms 286H–287A); *R v Gough* [1993] 2 All ER 724 diikut.]

Notes

For cases on application to disqualify judge from hearing case, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2113–2114.

Cases referred to

Alkaff & Company v The Governor-in-Council & Ors [1937] MLJ 211 (refd)

Bainton v Rajski (1992) 29 NSWLR 539 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)

Livesey v New South Wales Bar Asociation (1983) 151 CLR 288 (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd & Anor and other appeals [2000] 2 WLR 870 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321 (refd)

PP v Lau Tuck Weng & Anor [1988] 3 MLJ 217 (refd)

R v Bow Street Metropolitan Stipendiary Magistrate & Ors; Ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577 (refd)

R v Gough [1993] AC 646 (folld)

Raphael Pura v Insas Bhd & Anor [2002] 1 CLJ 397 (refd)

Muhammad Shafee Abdullah (*Azhar Azizan* and *Walter Preira* with him) (*Kamarudin & Partners*) for the plaintiff.

Wong Chong Wah (*Wong Chee Lin* with him) (*Skrine*) for the first to fifth respondents .

Lim Kian Leong (*Lim Kian Leong & Co*) for the sixth respondent.

Zainun Ali J: What I have before me is one of those rare judicial moments where I am asked to recuse myself from hearing and determining all further proceedings in an action, including the trial thereof.

In this action, ie Suit No D2–22–1179 of 2002, the plaintiff had applied, inter alia, for a declaration that the failure of the fourth, fifth and

A sixth defendants to reappoint him as director in the said companies was wrong in law, unjustified and therefore null and void; and an injunction to restrain the first, second, third, fourth and fifth defendant from passing any resolution or make any decision to oust the plaintiff as director in the said companies.

B Thus, the present application is brought by the plaintiff that I be at liberty to discharge myself from hearing and determining this present action.

Background

C The prelude to this application is actually activated by the truculent Winding Up Petition No 28–587 of 2001 between the plaintiff and the sixth defendant, where the plaintiff was the petitioner.

In that petition, the sixth defendant (as respondent) filed an application to strike out the plaintiff's petition.

D In granting the order to strike out, I had made certain findings of fact, which the plaintiff had extracted and categorized at para 5 of the present application.

My findings of fact are listed below (at plaintiff's para 5 of this application):

E (a) that the plaintiff had threatened to derail the de-merger exercise if the first to eighth respondents named in the winding up petition did not agree to wind up Tan Chong Consolidated Sdn Bhd ('TCC');

(b) that the plaintiff had harboured feelings of disquiet against the first respondent named in the winding up petition, ie the sixth F defendant herein which had fermented into what appeared to be intense pique;

(c) that the plaintiff's complaints were motivated not by his desire to redress wrongs committed against, inter alia, the plaintiff but instead for a collateral purpose;

G (d) that the plaintiff's complaints stemmed from the slights (imagined or otherwise) from a brash, younger man, namely the sixth defendant herein;

(e) that the plaintiff's feelings of disquiet were largely motivated by self-interest and self-preservation and not because there existed a real H breakdown of trust and understanding;

(f) that all the agitations were excited almost entirely because the plaintiff had already harboured an intention to wind up TCC;

(g) that the only complaints of the plaintiff against the sixth defendant herein before the EGM of 11 September 1999 were the decisions I made on Nissan JV in China, Subaru JV in China, buying office space in Hong Kong and increasing his and the second respondent named in the winding up petition salaries, without consulting him;

(h) that there was no evidence to show that the sixth defendant herein had exceeded his powers for some illegitimate or ulterior purpose; A

(i) that the plaintiff suffered from a bad case of petulance and peevishness which led to mulish resistance to agree to sign the circular resolution approving the de-merger;

(j) that the plaintiff had acted unreasonably; B

(k) that the plaintiff had conducted himself in a wanton and unreasonable manner, and that the plaintiff's conduct was in careless disregard of the interests of the other shareholders in the listed company;

(l) that the plaintiff was prepared to put his own selfish interest to wind up TCC ahead of the interests of the TCMH Group and all its public shareholders as well as the interest of TCC and its shareholders as a whole; C

(m) that the plaintiff's complaints after the 11 September EGM were largely against the conduct of the sixth defendant named herein viz-a-viz his position in TCC which mostly concerned management issues relating to the four public listed companies and should be dealt with at the public listed companies' management level, and that such allegations were in any event irrelevant to justify reasons to wind up TCC. D

(n) that the plaintiff had a collateral purpose and bad faith in filing the petition; E

(o) that the plaintiff seemed determined at all cost to wind up TCC to the extent where they had failed to disclose facts to the court;

(p) that the plaintiff could not justify that he was oppressed and denied participation in the affairs of TCC when the petitioners and several of their family members were actively involved in the management of TCC and companies within the Tan Chong Group of Companies. F

(q) that what the plaintiff found galling was to be outvoted on most counts; G

(r) that the only thorn in the flesh of the plaintiff was that the respondents named in the winding up petition were in effective control by virtue of their collective shareholding, while the petitioners were not;

(s) that the plaintiff's maudlin pre-occupation with tradition and remembrance of things past got in the way of the practical, pragmatic corporate governance of the day; and H

(t) that the plaintiff had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

The plaintiff's case I

The plaintiff's case is that, in delivering my grounds of judgment in the application to strike out, the above findings and comments on the conduct

and character of the plaintiff, were adverse to the plaintiff and that an impartial, reasonable and fair minded person with knowledge of the relevant facts, in the light of the said findings, would entertain a reasonable suspicion that there is a real likelihood that a fair trial of this action and proceeding will no longer be possible, because there is an appearance of bias by reason of prejudgment.

The defendant's case

The defendant on the other hand says that the plaintiff's allegations of prejudgment and bias is firstly contemptuous. Secondly, the defendant says that there are no grounds upon which the application for recusal can be justified.

Thirdly, that if the plaintiff's application is allowed, it would undermine public confidence in the system of justice in this country.

The defendant added that in making the said findings, the court was merely exercising its judicial function, based on the evidence and if the plaintiff's application is allowed, it would amount to giving the public an impression that the court had in fact not acted upon the evidence before it.

Counsel for both parties had submitted on the points raised, skillfully avoiding terms or language that would or could rile the Bench.

The applicable test

I shall begin by looking at the test to be applied, gleaned as they are, from the body of authorities found in the Commonwealth. The following set of tests seem to have emerged, for applications seeking to disqualify the judicial arbitrator for bias. They are:

(a) the real suspicion of bias test;

(b) the real likelihood of bias test; and

(c) the real danger of bias test.

The mutation of the applicable tests from the 'real suspicion of bias' and/or 'real likelihood of bias' test, to the 'real danger of bias' test in the English jurisdiction, is best illustrated in the decision in *R v Gough* [1993] AC 646. In this case, Lord Goff observed that the test is best stated in terms of it being a real danger of bias, rather than a real likelihood of bias and that the real danger of bias is the preferred test. Lord Goff in clarifying what he meant by 'real danger of bias' said that (at p 670):

> Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in terms of *possibility* rather than probability of bias. (Emphasis added.)

However, the decision in *R v Gough* had not found favour with other Commonwealth jurisdictions such as Canada, Australia and New Zealand, which continued to adopt and apply the 'real suspicion of bias' test.

Likewise, the Court of Appeal of UK in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor and other appeals* [2000] 2 WLR 870 observed that *R v Gough* was not accepted in Australia, South Africa, Scotland and the European Court of Human Rights, which continued to apply the 'reasonable suspicion' or 'reasonable apprehension' test. A

Since *R v Gough*, there appears to be no occasion for the House of Lords to review the 'real suspicion of bias' test in that case, since the cases of bias after that such as the *R v Bow Street Metropolitan Stipendiary Magistrate & Ors; ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 and *Locabail* cases were concerned with 'interest bias' or 'actual bias', which required 'automatic disqualification.' B

I might mention here that the 'bias' principle (whether it is apprehension of bias, likelihood or real danger), must find its justification in the importance of the basic principle that the judicial arbitrator must be impartial. C

Its application requires two steps.

Firstly, it requires the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits. D

The second step is that there has to be an identification of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

It would be interesting to see whether the above steps are manifested in the present application. E

Though the different bias tests have been amply demonstrated in several case laws, the distinction between them is apparent. However, the nicety of the distinction is a question of degree.

The plaintiff favours the 'reasonable apprehension test', premised on the principle that the doctrine of disqualification is conjoined with that fundamental principle that 'justice should manifestly and undoubtedly be seen to be done' and that, that would be the perception of both the parties and the public. F

Thus, going by the 'reasonable apprehension of bias test', this is tested by reasonable standards, according to what might have affected the judge's approach. G

However, in the case of 'real danger of bias test', the threshold for the finding of bias is high — where the party alleging bias has to establish actual bias, or demonstrate real likelihood of probability of bias against the judge and a mere suspicion, however reasonable is not enough. H

The plaintiff counsel took us through the Malaysian case laws on the question of bias, in trying to establish the test applicable.

Although Malaysian judicial opinion seems to be at variance on this point, it might be noted that the Federal Court in both *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 and *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 followed *R v Gough* applied the 'real I

A danger of bias' test; whereas cases such as *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 and *Alkaff & Company v The Governor-in-Council & Ors* [1937] MLJ 211 and *Public Prosecutor v Lau Tuck Weng & Anor* [1988] 3 MLJ 217, preferred the 'real suspicion of bias' test.

B Thus, as can be seen, the concept of bias is not a nebulous concept but one which is stark. In both *Locabail* and *Hock Hua*, the court held that mere adverse comments does not give rise to accusation of bias in the legal sense, because the law assumes that the judge hearing the case is fair minded and will dispense justice even handedly.

C The plaintiff submitted that pursuant to the proper application of any of the three tests to the facts in the present case, it should lead to one conclusion only, and that is — taken from the perspective of the 'reasonable man sitting in court and knowing all relevant facts and/or taking into account all of the relevant fact and circumstances, the only possible conclusion would have been that the judge must be disqualified' [my D emphasis].

Before going any further, it would be useful to offer a definitive treatment of the word 'bias'.

Put simply, bias is a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

E Thus, if it can be proven that there is bias, it colours the entire proceeding, which no subsequent finding can cure.

However, it is my view that not every favourable or unfavourable dispositions are objectively justifiable, since such dispositions would not constitute impermissible bias.

F For example, surely those who condemn Machiavelli or Macbeth, shows objectively justifiable disposition and therefore such comment does not give rise to reasonable apprehension of bias on the part of the speaker.

Thus, if the ground as manifested in this application is that, a G reasonable man sitting in court may find that there is bias in that the plaintiff may not be given a fair trial on account of my statements in the grounds of judgment and that statement has a direct impact upon the issues raised in the present suit, then regard must be had to the question of judicial reasoning in the course of judicial function.

It has always been recognized that judges ground their judicial opinion H on logical reasoning based on the material before them, sustained by objective evidence.

In so doing, many judges conserve expressions of belief or disbelief to cases where it is essential to express them.

More specifically, cases may arise where judges feel obliged to express I an opinion as to the character of the party. If this fact is the basis of the judge's decision, candor and honesty in the expression of judicial reason requires the conclusion to be stated.

Likewise, if I had come to a conclusion that the plaintiff had acted in a certain way (as in the striking out application), there can be no doubt that it is part of my judicial duty to state my reasons for so doing. A

And if this is made in the context of deciding questions of fact by a disclosed reasoning process, if they are necessary to show why such questions have been resolved in a certain way, a failure by me to state them not only breaches my obligation to give reasons, but leads potentially to injustice for the party who would otherwise benefit from them. B

To question this, would be in some way, to impugn the judge's neutrality (or as in this case, mine).

The judgment of the judge, will of necessity, be structured to explain the conclusion to which the judicial mind had come to as was done in the striking out order. C

Bearing in mind all these factors, the question now is:

What is the applicable test? As the court in *Raphael Pura v Insas Bhd & Anor* [2002] 1 CLJ 397 seem to imply, the distinction between the test (or at least two of them, ie reasonable suspicion of bias and real danger of likelihood of bias) seem very thin, as alluded to earlier. D

It is also well known that in the matter of disqualification or recusal, the alternative tests are sometimes seen as competing.

Thus, if a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless, he would reasonably suspect bias. E

In such circumstances, I feel that one must query whether the law should countenance such refinements. In any event, having regard to the authorities cited by both parties in this application, it is my view that the correct test to be applied in this case is the 'real danger of bias' test, as approved by the Federal Court in *Mohamed Ezam*, following the *Gough* principle. F

Looking again at the plaintiff's application, one might well ask;

What is the basis of the plaintiff's application? The short answer to this is that, it is nothing more than the remarks or observations or findings made by me in the striking out order of 12 December 2001, and which plaintiff now says has a direct impact upon the issues raised in the present suit. G

In other words, the plaintiff now suggest that such a judicial denunciation made in the said striking out order carry particular consequences to him. H

At its most basic, the event's findings which is not favourable to plaintiff cannot amount to bias. The mere fact that plaintiff alleges bias is not of itself ground for disqualification of a judge (see *Livesey v New South Wales Bar Asociation* (1983) 151 CLR 288).

Based on the real danger of bias test, each case must be judged on its own facts and one must be cautious not to take the words out of context and magnify them to excessive scrutiny. I

A The plaintiff's contention that the basis of his claim is that he has been ousted as director of the defendant companies on account of the court's findings is unsustainable, and verges on sheer exaggeration.

There is no identification of the connection between this phenomenon and the feared deviation by me from the course of deciding the case on its B merits.

Even if the natural human desire for consistency of thought might be thought to operate to incline a judge to uphold an opinion expressed earlier, this cannot constitute or ground an allegation of real danger of bias, since this would involve a finding by the plaintiff that I was in fact unable to and did not comply with my judicial obligation; or that the court C had acted on wrong principles and based its decisions or findings on erroneous considerations, or that insufficient weight was given to relevant matters.

It is not shown that I had allowed unnecessary, inappropriate or irrelevant consideration to intrude into my findings about the plaintiff in the D striking out order.

More importantly, the real danger of bias test, would invite a finding that the judge did not attend to the evidence properly, but rather, reached a decision determined by reference to previously expressed views.

Obviously, the plaintiff in his application showed no such propensity on E my part, or made such a finding itself.

On this rather equivocal and flimsy stand, the plaintiff's ground must fail.

I would stress yet again that the findings made by me were grounded on the facts and materials before me and bias cannot flow simply from a F finding, albeit one which is critical of a party, provided the evidence to which I have had regard, supports such a finding.

The next question is whether, in making this application, the plaintiff had transgressed the bounds of propriety and had therefore committed contempt.

G I take this 'transgression' as simply an incident of judicial office, of which no busy judge can escape.

I suppose different judges respond differently to allegations of judicial bias. There are of course, various restraints which tend to discourage the making of the accusation of bias, unless it is deemed serious and relevant.

H In any case, if candor on the part of the judge in expressing his reasons is to be defended, so candor on the part of the litigants must be expected.

But when it is made, it is essential that the judge should approach it without being defensive or resentful.

I Thus I would take the approach as that taken by the court in *Bainton v Rajski* (1992) 29 NSWLR 539, that an application that a judge disqualify himself for bias is not contempt.

Based on the foregoing, there is therefore no valid and good reason to allow the plaintiff's application to disqualify me from hearing and determining all further proceedings in this action.

The plaintiff's application is therefore dismissed with costs.

Application dismissed.

Reported by Peter Ling